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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 3

THE TIMES-MIRROR COMPANY, A CORPORATION, AND L. D. HOTCHKISS,

Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES,

Respondent.

On Writ of Certiorari to the Supreme Court of California

PETITIONERS' BRIEF ON REARGUMENT

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Whitney v. *California*, 274 U. S. 357 ..... 27, 28, 31
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STATUTES CITED.

California Code of Civil Procedure, Sec. 1209, Subdiv. 11 26
California Penal Code, Sec. 1203 15

TEXTS CITED.

Brandeis, Mr. Justice (Yale University Press, 1932), p. 111 28
Corpus Juris, Vol. 16, p. 536, Sec. 1008 20
Law and Its Administration, by Harlan F. Stone (Columbia University Press, 1924), p. 45 27

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Additional argument based largely upon decisions of this court, announced immediately preceding and subsequent to oral argument during 1940 Term, may be of assistance in a further consideration of this case.*

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*Italics are ours unless otherwise noted.

History of the Proceedings.

Petitioner The Times-Mirror Company publishes the Los Angeles Times, a daily newspaper of general circulation in Los Angeles County. Petitioner Hotchkiss is its Managing Editor.

Two citations for contempt were issued by respondent court upon application of a committee from one of three Los Angeles associations of attorneys. No judge or other public official joined in instituting or prosecuting the proceedings. Over petitioners' protests the committee of private attorneys prosecuted the proceedings to judgment. The citations required petitioners to show cause why they should not be held in contempt of court for the publication of seven editorials published over a period of six months. The proceedings were summary and in violation of the state statute prohibiting summary prosecution for constructive contempt by publication. Judgments of conviction were pronounced on five of the seven editorials. In the trial and appellate courts petitioners relied upon the First and Fourteenth Amendments guaranteeing free speech and a free press. The cause is here upon certiorari and involves consideration of a judgment abridging freedom of the press on the asserted ground that its exercise in three instances has actually interfered with the orderly administration of justice.

Summary Proceedings Emphasized.

We emphasize the circumstance that in violation of the state statute, petitioners were prosecuted summarily and convicted of crimes punishable by imprisonment, not because prosecution by a group of private attorneys, the denial of a jury trial, and the disregard for the legislative declaration of state policy present a federal question, but because

this court of recent date has announced its grave concern when "the vital individual freedoms guaranteed by the First Amendment" are "partially whittled away" by the courts "acting without a jury in the exercise of its broad power to punish for contempt."[1]

In the *Nye case* (4/14/41) this court stated it would meticulously observe the separate categories of contempts enumerated in the federal statute

> "* * * so that the instances where there is no right to jury trial will be narrowly restricted."[2]

In a dissenting opinion in the *Meadowmoor Dairies, Inc. case,* the question before the court was stated:

> "To what extent will the layman who might wish to write about or discuss the prohibited subjects feel that he cannot do so without subjecting himself to the possibility of a *jail sentence under a summary punishment for contempt?*"[3]

The Three Editorials Here Under Consideration.

They are three: *First,* an editorial entitled "SIT-STRIKERS CONVICTED", published approximately *six months* preceding the contempt citation; *Second,* an editorial entitled "THE FALL OF AN EX-QUEEN", published approximately *seven weeks* preceding the citation, and, *Third,* an editorial entitled "PROBATION FOR GORILLAS?", published *one month* preceding the citation.

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[1] *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U. S. 287, at 302 and 309 (dissenting opinion of Mr. Justice Black).

[2] *Nye v. United States*, 313 U. S. 33, at 49.

[3] 312 U. S. at 308.

1. "SIT-STRIKERS CONVICTED" SYNOPSIS AND ANALYSIS.

The editorial "SIT-STRIKERS CONVICTED" (R. 11) was published the day following a jury verdict of guilty against twenty-two defendants charged with a felony. The defendants and many others had previously conducted a sit-down strike at the Douglas airplane plant, in Los Angeles County. The editorial declared that the verdict would have reverberations up and down the Pacific Coast; that the City of Los Angeles is aroused to the danger of "davebeckism": that the verdict may have a good deal to do with sending Dave Beck back to Seattle, and if Beck can be convinced that this kind of warfare is not permitted in Los Angeles, he will abandon his dreams of conquest; that the farmers have given Beck a setback; it has been made plain that interference with milk deliveries will not be tolerated; the District Attorney in a radio address pledged his best efforts to prevent and punish union terrorism and racketeering, and later made a statement congratulating the jury and the community on one of the "most far-reaching verdicts in the history of this country."

The editorial then declares:

> "In this he is correct. It is an important verdict. For the first time since the present cycle of labor disturbances began, union lawlessness has been treated as exactly what it is, an offense against the public peace punishable like any other crime."

That such seizure of property is within the control of local authorities; that government may have broken down in other localities but Los Angeles County stood firm, its officers did their duty, and the courts and juries functioned, and so long as this condition prevails "davebeckism will not get control nor johnlewisism either."

As we interpret it, the plain purport of the editorial is

that "davebeckism" shall not prevail in Los Angeles. The Dave Beck industrial philosophy is condemned. Law enforcement is approved. Eliminating Dave Beck and John Lewis, the individual or personal equation is entirely absent. A principle is advocated.

The editorial is directed mainly and unfavorably at "davebeckism" and the "sit-down strike", and favorably at law enforcement agencies and, what it calls, "an important verdict."

This editorial was published December 21, 1937. Fourteen months later, February 27, 1939, this court announced that the sit-down strike, accompanied by seizure of the employer's property, was a "high-handed proceeding without shadow of legal right."[4]

Background of Record Facts to Which the Editorials Related.

To appraise accurately the meaning and effect of these editorials, it is necessary, as stated by Mr. Justice Brandeis in *Schaefer* v. *United States*,[5] to consider local conditions, attitudes and practices which may enlarge or otherwise control their meaning or which may show that they were circulated under circumstances which gave them peculiar significance or effect.

Concerning Dave Beck.

It is admitted that Dave Beck, referred to six times in one editorial and three times in another, is the labor boss of Seattle (R. 48), and virtual political and industrial dictator of Puget Sound territory; that he had closed highways and industries, halted import of raw materials, stopped deliv-

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[4] *NLRB* v. *Fansteel Metallurgical Corporation*, 306 U. S. 240, at 252.

[5] 251 U. S. 466, at 483-484.

eries to consumers, forced organization of, and payment of tribute by, service industries delivering foods, fuel and household necessities; that Beck endeavored to extend his domination to Portland where, opposed by the authorities, his lieutenants were indicted and pleaded guilty to acts of assault, arson and bombing.

Beck Threat to Los Angeles Industrial Area.

That Beck had frequently threatened to bring the Los Angeles industrial area under his control; that in February, 1937, Mayor Dore of Seattle, a supporter of Beck, declared in Los Angeles, publicly, that Dave Beck's political party had made Seattle one hundred per cent union, and the same would be true in Los Angeles; following this and similar statements, *the Los Angeles Times published a series of front-page articles* entitled "Progress in the Northwest"; these articles commenced about two months prior and ended one week subsequent to the publication of the Sit-Strikers Editorial; each article described some phase of business in the Beck dominated area and the manner in which industries suffered therefrom; these articles "were published for the purpose of informing Times readers of what might be expected should the threat of 'davebeckism' become a reality in" the Los Angeles area (R. 50).

Policy of The Times on the Use of Violence in Labor Disputes.

It was stipulated to be true (R. 134) that for fifty years the Los Angeles Times has done everything within its power to maintain the open-shop principle in Southern California; that because of *many hundreds* of editorials published by it, the Times has become thoroughly identified in the public mind with the open-shop policy; that it has become the leader of community thought on the subject.

That numerous efforts have been made to dislodge the open-shop system in the industries of Los Angeles. Many have been accompanied by violence ranging from felonious assaults to dynamiting of open-shop establishments (Los Angeles Times plant) accompanied by loss of life.

> "These activities have been factually reported in the news columns of The Times, and their illegal * * * character *editorially pointed out and commented upon.*" (R. 45)

> "Throughout the period of sit-down strikes (stated in detail [R. 45-47]) The Times *commented on them frequently and vigorously*, taking the position that such efforts constituted illegal * * * seizure * * * of private property * *. *It applauded the action* of authorities here and elsewhere so to deal with them * * *." (R. 47)

As Analyzed by State Supreme Court.

The state Supreme Court analyzed the editorial ("SIT-STRIKERS CONVICTED") in the following language (R. 127):

> "The editorial entitled, 'Sit-Strikers Convicted' unquestionably approved the jury's verdict. It praises the jury for its rendition, and the court in which the action was pending. It discussed the importance of the verdict and its effect upon the industrial strife then being waged in and beyond the limits of the City of Los Angeles. Its reference to 'union terrorism and racketeering' can only be construed as implying that the convicted defendants in the pending action were engaged in such activities. These *expressions* of approval of the verdict and *condemnation of the convicted defendants* made by such an influential paper as the Los Angeles Times on the *day just preceding the day fixed by the court* for pronouncing sentence could not help having an effect upon the trial judge, who, as we have seen, was clothed with a wide discretion in fixing the punishment of the

convicted defendants, to say nothing respecting his duties *in case* a motion for a new trial was made or an application for probation was presented to him. It cannot reasonably be said that they *would have no tendency to influence* the trial judge in rendering the judgment, or in ruling upon the other matters that in the regular order of the proceedings in criminal matters would come before him in the case then pending. The editorial *may not have been intended*, but it is *capable* of being construed, as a notice to the trial judge that *no leniency* should be extended to the convicted men, and, *furthermore*, that should the court act contrary to the suggestions contained in the editorial, it might *well expect adverse criticism* in the columns of The Times. Viewing the editorial *in the light of these considerations*, we are satisfied that its reasonable tendency was to interfere with the ordinary administration of justice by the court in the action then pending before it." (R. 127-128)

Unwarranted Assumptions.

The considerations in the light of which the California court concluded the editorial interfered with the orderly administration of justice were, to use its language:

1. Expressions of condemnation of the convicted defendants;
2. Notice to the trial judge that no leniency should be extended to the convicted men;
3. Threat of adverse criticism if the court acted contrary to the suggestions contained in the editorial.

In the editorial there is no condemnation or mention of the convicted defendants other than to say that twenty-two sit-strikers had been found guilty by the verdict of a jury. There is no intimation in the editorial respecting pronouncement of sentence. Threat of adverse criticism is an unwarranted assumption. As stated in the closing paragraph of

the dissenting opinion of the Chief Justice of the California court,

> "All this is indicative of the lengths to which imagination may go in building groundless fears and in imputing potent and obstructive purposes foreign to the intent of the writer." (R. 148)

Regarding like assumptions this court has stated:

> "But the situation is controlled by the *reasonable tendencies* of the acts done and not by *extreme* and substantially impossible assumptions on the subject."[6]

> "And standing alone, as it did in this case, there was nothing which warranted the court or jury in ascribing to this language, either as an inference of law or fact, 'the sinister meaning attributed to it by the state'."[7]

Judges Are Presumed to be Men of Intellectual Discipline and Fortitude.

In a dissenting opinion below, it is said:

> "The asserted contempt is derived entirely from the *supposed* tendency of the language used. * * *
>
> "The first editorial 'Sit-Strikers Convicted' commends the conviction of certain persons as a victory for law and order and expresses pride in the functioning of local courts and juries. It refers to a radio address made by the district attorney and quotes a statement made by him congratulating the jury on one of the 'most far reaching verdicts in the history of this country'. There is certainly nothing in this editorial which should influence *any* judge in the performance of his duty." (R. 145)

In declaring that the editorial should not influence "any judge", the author manifestly did not refer to a "weak

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[6] *Toledo Newspaper Co. v. United States*, 247 U. S. 402, at 421.

[7] *Fiske v. Kansas*, 274 U. S. 380, at 386.

judge" or a "spineless judge", or to "a judge who was politically minded, a judge who was weak with respect to extraneous influence, a judge who has his ear to the ground", as advocated by counsel for respondent in the state court, but probably had in mind the character of individual contemplated by Mr. Justice Holmes and Mr. Justice Brandeis when they said:

> "I confess that I cannot find in all this or in the evidence in the case anything that would have affected a mind of *reasonable fortitude*, and still less can I find there anything that obstructed the administration of justice in any sense that I possibly can give to those words."[8]

In *United States* v. *Morgan* (5/26/41), this court, in comparing a cabinet officer exercising judicial functions with judges, declared:

> "Cabinet officers charged by Congress with adjudicatory functions are not assumed to be *flabby* creatures any more than *judges* are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and *intellectual discipline*, capable of judging a particular controversy fairly on the basis of its own circumstances."[9]

Policy of The Times Was Well Known.

It was conceded in the state courts that the long established policy of the Los Angeles Times on the use of violence in labor controversies was well known. The trial court said:

> "It is of no consequence that this editorial, as argued by counsel for respondents, merely expressed the atti-

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[8] *Toledo Newspaper Co. v. United States*, 247 U. S. 402, at 425 (dissenting opinion of Mr. Justice Holmes).

[9] 313 U. S. 409, at 421.

> tude which the Los Angeles Times had maintained for more than fifty years toward those who committed violence during labor disputes." (*R.* 116)

The majority opinion of the state Supreme Court declares:

> "It was stipulated that the allegations contained in said affidavit (Harry Chandler) were true. * * * The weight to be given to this evidence was solely a matter resting with the trial court. * * * The affidavit * * * did no more than *cause a conflict in the evidence* which the trial court resolved against petitioner." (R. 134)

There is no conflicting evidence in the record. Throughout this appeal we have attempted to obtain from counsel for respondent a defense of the court's statement respecting "conflict in the evidence." Nothing has been said in support of it. The matter is emphasized in our Reply Brief (pp. 10-11).

In one of the dissenting opinions below appears this language:

> "Could there be any possible doubt in the mind of any informed resident of Los Angeles on the attitude of the Times in regard to the use of violence in labor disputes. The position maintained by the Times over many years on these matters is clearly established by the record. Its Los Angeles readers would find nothing unusual in the editorial; a judge who felt that it was obstructive or embarrassing would have to confess ignorance of one of the most familiar facts of the daily life of his community." (R. 146-147)

2. "PROBATION FOR GORILLAS?" EDITORIAL STATED IN FULL.

The editorial "PROBATION FOR GORILLAS?" was published approximately two weeks following the verdict of a jury finding two defendants named in the editorial

guilty of assault with a deadly weapon and conspiracy to commit the crime. The editorial was published *five weeks* prior to the date set for hearing an application for probation. The editorial, in three paragraphs, is as follows (R. 23):

> "Two members of Dave Beck's wrecking crew, entertainment committee, goon squad or gorillas, having been convicted in Superior Court of assaulting non-union truck drivers, have asked for probation. Presumably they will say they are 'first offenders,' or plead that they were merely indulging a playful exuberance when, with sling-shots, they fired steel missiles at men whose only offense was wishing to work for a living without paying tribute to the erstwhile boss of Seattle.
>
> "Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals. Men who commit mayhem for wages are not merely violators of the peace and dignity of the State; they are also conspirators against it. The man who burgles because his children are hungry may have some claim on public sympathy. He whose crime is one of impulse may be entitled to lenity. But he who hires out his muscles for the creation of disorder and in aid of a racket is a deliberate foe of organized society and should be penalized accordingly.
>
> "It will teach no lesson to other thugs to put these men on good behavior for a limited time. Their 'duty' would simply be taken over by others like them. If Beck's thugs, however, are made to realize that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill."

Admitted Facts Respecting Probation Proceedings in Los Angeles County.

An affidavit of record (R. 53), admitted and uncontradicted (Orig. R. 155), recites the practice prevailing in Los Angeles criminal courts in probation proceedings. It incorporates excerpts from the book "Adult Probation", by Mr. Justin Miller, which, in commenting on probation proceedings in Los Angeles County, discloses that the probation officer sends letters to persons acquainted with the applicant, seeking detailed information concerning his past life. Voluntary letters are also received, both for and against the granting of probation. In one case, involving violation of the Corporate Securities Act, the Probation Department received petitions and letters containing the signatures of 300 to 400 persons, both for and against the defendant. These and the responses to the inquiries of the probation officer are made a part of a report to the judge before whom the application is pending. The affidavit discloses the Presiding Judge of the Superior Court has declared that the probation officer's report should reflect the identity of the persons sponsoring the application (R. 55).

Admitted Facts Bearing on the Editorial "PROBATION FOR GORILLAS?".

Facts stipulated to be true disclose that the convicted defendants during their trial were described as goon squad members; that the Times acted upon its knowledge of the long-established practice in probation matters for those in charge to invite informed opinion on the question of whether or not probation should be granted; that the Times was aware of the custom of probation officers to send out requests for expressions of opinion; that in one recent probation case, where the Times editorially criticized the granting of probation subsequent thereto, the Presiding Judge of the

Los Angeles Superior Court advised the Times that its position should have been made known while the matter was pending, instead of afterward (R. 52). In the belief that it was qualified to give an informed opinion on the subject, the editorial was prepared and published in an effort disinterestedly to serve what it conceived to be the best interests of the community (R. 52).

Comments of the State Court on the Editorial.

The state court majority opinion declares that another newspaper might publish an article favoring probation, and that

> "We would then have the deplorable situation of a heated newspaper controversy being carried on in the community while the question of probation was before the court for determination. That such a situation would contribute to the orderly administration of justice, we think no one would contend." (R. 132)

This court is authority for the statement

> "that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving *desirable conditions*."[10]

We contend it does not follow that because some hypothetical situation would not contribute to the orderly administration of justice, the instant situation has substantially interfered with the orderly administration of justice. It is our opinion that the granting of probation or parole to convicted felons is a matter of serious public concern, and that public discussion of such applications while they are *actually pending* will promote the administration of justice.

We invite the court's consideration to the brief of the American Newspaper Publishers Association filed in this

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[10] *Cantwell v. Connecticut*, 310 U. S. 296, at 308.

case, and in particular to pages 19 to 21, inclusive, setting forth excerpts from addresses by Mr. J. Edgar Hoover (Federal Bureau of Investigation) citing statistics and expressing persuasive opinion of the advisability of a more stringent administration of parole and probation proceedings. The facts there recited clearly establish the need of pitiless publicity while such proceedings are pending.

The majority opinion of the state court declares they do not mean to hold that a person interested for or against probation of a defendant may not make his views known to the probation officer who will pass the matter along to the trial judge.

> "But to approach the judge either directly or indirectly, through the columns of a newspaper, or otherwise, in our opinion is not permissible." (R. 133)

Rule of Decision Respecting Probation Proceedings.

In California the code (Penal Code 1203) specifically forbids granting probation to a defendant convicted, as were the two defendants mentioned, of an assault with a deadly weapon, and the appellate court has recently so construed the code (see Pet. Br. p. 31). The California appellate tribunals have likewise declared that, in acting upon applications for probation, the court is not controlled by legal rules.

> "It must be guided by considerations pertaining to psychology, sociology and penology, or, in the words of the code, to 'the ends of justice'; by general rules of policy which have not been and in the nature of the case should not be crystallized into positive or definite rules of law."[11]

In proceedings to revoke probation, it has been expressly recognized that the same are *informal* and not governed by legal rules.

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[11] *People v. Jones*, 87 Cal. App. 482, at 497.

"The procedure for revoking probation is wisely made informal. * * * No particular *source*, manner or degree of *proof* is required by statute. * * * Pursuant to our statute, however, the judge or justice having jurisdiction of the cause may, in the exercise of sound discretion, based upon facts presented in an *informal* fashion, from which he has reason to believe the prisoner has violated his probation or is unfit to be at large, revoke the order suspending sentence and commit him to jail."[12]

In one of the dissenting opinions in the state court, we find this language:

"The publisher's affidavit calls attention to the familiar fact that in probation proceedings outside opinions and recommendations are invited. It is further pointed out that a former Presiding Judge of the superior court advised the Times that a criticism of a certain probation order published after it was granted, should have been made while the matter was pending. * * *

"Consider, however, the character of the case, and the circumstances surrounding it. This was no everyday affair, but one in which the public interest was aroused, and the events were widely discussed in the community. * * * The attitude of the Times is made abundantly clear, and its bitter feeling toward certain labor leaders colors its opinions, but what of that? The Times is not on trial for its opinions; * * *. The Times is charged with obstructing justice and interfering with a pending judicial proceeding, and there is *no evidence* whatever of such obstruction or interference. The case had been tried, and verdict rendered; the jury was gone, and matters of sentence and probation were before the judge alone. In deciding these matters the judge has few, if any definite rules to guide him; he is influenced by countless experiences and observations, as well as by the total sum of impressions received from public

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[12] *In re Young*, 121 Cal. App. 711, at 714-715.

and private comment on similar problems throughout his judicial life. * * *

"And what if the judge was, in fact, aware of the views expressed in the third editorial; can it be said he was being informed for the first time of the position of the Times in cases of this character?" (R. 146)

3. "THE FALL OF AN EX-QUEEN" SYNOPSIS AND ANALYSIS.

The editorial "THE FALL OF AN EX-QUEEN" (R. 17) was published two days following the jury verdict of guilty against Mrs. Helen Werner and her husband for grand theft and solicitation of a bribe. The editorial stated that politics is essentially a selfish business, and when of the "boss" type is sordid; that "boss-ship" is the denial of public rights and implies a type of moral obliquity; that it is a contradiction of terms to express regret that the political talents of Mrs. Werner were not directed to other objectives than those which in the twilight of her life have brought her and her husband to disgrace; that her natural flair was purely political and she would have been miscast in any other sphere of activity; that her mistake seems to have been in failing to recognize that her political day was past; for years she was the country's only woman "boss"; that she had a finger in every political pie, and extracted plums for those who played ball with her; that she became a power in city and county affairs and pulled the strings on state and legislative offices. At such times she was known as "Queen Helen"; that it is fair to say the power was more important to her than the perquisites; that with the inevitable turning of the political wheel new figures came to the front, new bosses to the back; she found her grip slipping and it was hard to take; that the several cases of recent years which have brought her before the courts are examples of an energetic effort to reassert her one-time influ-

ence; that it is not illogical that ultimately it should land her behind the bars as a convicted bribe-seeker, but the money meant less to her than the political power to do things with public officials; that at least to herself she remained "Queen Helen".

This editorial apparently was intended to point a moral. It points out rather persuasively that ability devoted to establishing political bossism in a large municipality leads to disaster. Outside the editorial itself, the record contains no facts relating to the subject matter thereof. The facts stated in the editorial constitute a sad commentary on misspent effort. There is no reference to any pending case or any pending proceeding.

The Affidavit of Complaint alleges that the respondents below, petitioners here, *knew* that a motion for new trial was pending and had been set for hearing (R. 16-17). The verified answer denies this allegation of knowledge (R. 32). No effort was made to prove it.

The opinion of the Supreme Court admits this to be the case.

The opinion reads:

> "While the editorial does not refer to the case which was then pending against Helen M. Werner, it *is hardly conceivable* that those in charge of its publication were ignorant of the *pendency* of said action." (R. 130)

The opinion proceeds:

> " * * * it *must be assumed* that the petitioners were cognizant of the action then pending against her, *and* that it had reached the stage which would require either the pronouncement of judgment or the granting of a new trial. With this *knowledge before them*, they prepared and published the editorial * * * ." (R. 130)

These assumptions are unreasonable and unwarranted. They violate the rule of evidence on an issue joined on the

question of knowledge and disregard the elementary rule that in contempt proceedings all intendments are in favor of the accused.[13]

In one of the dissenting opinions, the editorial is spoken of as follows:

> "The * * editorial 'The Fall of an Ex-Queen' is a brief and penetrating commentary on the political activities of Helen M. Werner. The subject of the editorial is used as an object lesson and the principal thought expressed therein is that political bosses rise and fall with changing times. I cannot find anything in this editorial which can be said to have even a *remote tendency* to obstruct the administration of justice or to influence or embarrass any judge." (R. 145)

The State Court Declared There Had Been an Actual Interference in Each Instance.

The California court concluded that each of the editorials constituted an *actual* interference with the orderly administration of justice. The opinion reads:

> " * * * the detriment caused by the publication of said editorials was the *probable denial of a fair trial* to the litigants in the actions then pending before the courts which were the subject of said editorials." (R. 138)

In each instance the trial was completed before the editorial was published. In one instance the trial had been completed two weeks before the editorial appeared. In each instance the editorial appeared before judgment was pronounced, but the pronouncing of judgment is no part of the trial. In a criminal proceeding the trial ends with the verdict of the jury. Nowhere is this more definitely established than in

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[13] *In re Shuler*, 210 Cal. 377, at 387; *Frowley v. Superior Court*, 158 Cal. 220, at 224; *Hall v. Superior Court*, 124 Cal. App. 603, at 605; *State v. American-News Co.*, 64 So. Dak. 385.

California. The California appellate courts have stated in so many words that

> "Pronouncing judgment, which is the formal declaration of sentence, is not the trial, nor any part thereof * * *. The trial ended with the announcement of the verdict of the jury, whereby it declared the result of its deliberations upon the issues of fact which had been submitted to it for its decision."[14]

Meaning of Finality in Pending Matters.

The editorial "SIT-STRIKERS CONVICTED" makes five references to a verdict previously rendered. As stated in one of the dissenting opinions:

> "The case had been tried, and verdict rendered; the jury was gone, * * *." (R.146)

The majority opinion in the state court declared:

> "While neither motion [for a new trial] nor application [for probation] had been made at the time of the publication of the editorial ["SIT-STRIKERS CONVICTED"], the right of the defendants to pursue said remedies existed * * *. We can see no force in petitioners' argument that because the editorial was published after the verdict, but prior to the making of said motion or application, the proceedings in the case had reached such *a point of finality* as to form a proper subject of comment." (R. 125)

In California, perhaps generally (16 *Corpus Juris*, p. 536, Sec. 1008), after a verdict of guilty the presumption is that the defendant is guilty.[15]

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[14] *People v. Stokes*, 5 Cal. App. 205, at 214-215.

[15] *People v. Arlington*, 131 Cal. 231, at 235; *People v. McNamara*, 94 Cal. 509, at 514; *Ex parte Brown*, 68 Cal. 176, at 180, 182, 183; *In re Wilkins*, 66 Cal. App. 754, at 758; *People v. Anderson*, 58 Cal. App. 267, at 274.

It is the verdict of the jury and not the pronouncement of sentence by the court that convicts a defendant of crime. Conviction is the verdict which ascertains and publishes the fact of guilt. Judgment or sentence denotes the action of the court "declaring the consequences to the convict of the fact thus ascertained."[16]

In the *Shuler* contempt proceedings in Los Angeles[17] (cited by respondent), Reverend Shuler, in a series of radio broadcasts, assailed the integrity and impugned the motives of various judges of the Los Angeles County Superior Court. The California Supreme Court, by unanimous opinion, reversed the conviction for contempt as to the first count in the affidavit of complaint. This count charged that upon the calling for trial of a notorious criminal case, the District Attorney requested a continuance on the ground that defendants were expected to act as state's witnesses in another pending criminal case. The judge presiding denied the request and two days later Shuler violently criticized his conduct and questioned his motives. The criminal proceedings were still pending. The Supreme Court declared:

> "Regarding the discourse as a whole, it appears that the main burden of its criticism of Judge McComb, would seem to have consisted in an attack upon certain of his rulings in the cases of the two defendants before him, which might be said to have *reached such a point of finality* as to form a proper subject of comment on the part of any citizen, under the broad terms of the provision of the Constitution guaranteeing liberty of speech, and of the press."[18]

The holding in the *Shuler case* that a point of finality, justifying vitriolic comment, had been reached before the trial

[16] *In re Anderson*, 34 Cal. App. (2d) 48, at 50.
[17] *In re Shuler*, 210 Cal. 377.
[18] 210 Cal. at 386-387.

commenced, cannot be reconciled with the holding herein that a point of finality had not been reached, justifying temperate comment, after the trial was completed, the comment in each instance referring to a completed step in the criminal proceedings.

The State Court Declares the Fate of the Defendant Is Not Finally Determined by the Verdict.

The California court declares:

> "It cannot be successfully contended that the verdict was decisive of the case or was a *final determination of the fate of the defendants.*" (R. 125)

Unquestionably many conventional court proceedings are open to a convicted felon after verdict and prior, as well as subsequent, to sentence. During these proceedings the presumption exists that the defendant is guilty as found.[19]

A final determination of the fate of a defendant found guilty of a capital offense is reached either by pardon or execution. In a capital case, where the defendant pleads guilty and is sentenced to death, until he is executed conventional proceedings are open to him for staying execution, prosecuting an appeal, causing delay of a year or more, and perhaps securing a reversal of the judgment passing sentence of death entered upon his plea of guilty. This has occurred of recent date in California.[20]

Following a verdict or plea of guilty, the rule of the California court proscribes comment which any judge in summary proceedings may conclude from an introspective consideration has a tendency to influence either the judge in pronouncing sentence, or a jury in its deliberations in event of new trial. The opinion of the California trial court specifically anticipates the latter contingency.

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[19] *In re Wilkins*, 66 Cal. App. 754, at 758.
[20] *People v. Campos*, 3 Cal. (2nd) 15.

"If [motion for new trial is] granted, the action would still be pending and if tried a second time prospective jurors *no doubt* would have been influenced by the editorial." (R. 110)

Respondent's Concessions re Finality.

In the briefs of respondent in this court, however, counsel concede that finality of the particular *proceeding or matter* under discussion justifies public comment on judicial proceeding, and that finality of judgment in the case is not required.

From the Supplemental Brief of Respondent we quote:

"It should be remembered that discussion is not necessarily deferred until the entire cause is ended; that it is improper only as to pending matters."[21]

And again,

"Finality is requisite, but it is finality of the matter under discussion. So held as to the first count of the Shuler case in 210 Cal. at 387. But it was likewise there held that the finality of that *first phase* of the cause did not warrant the discussions mentioned in the second and third counts and which related to *approaching* judicial action on *other* phases of the case. So at bar, petitioners *were not convicted* because of the relation of their publications *to the verdicts* mentioned; it was because of the potential influence upon phases of the case which were still pending and which would require early action by the judge."[22]

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[21] Resp. Supp. Br. 31.

[22] Resp. Supp. Br. 41.

Clear and Present Danger Doctrine Should Have Been Applied.

History of Clear and Present Danger Doctrine.

The clear and present danger doctrine, as applied by this court, was first announced in the opinion of Mr. Justice Holmes in *Schenck* v. *United States*,[23] decided in 1919, although its adoption and application did not result in a reversal of the judgment. Not until 1937, in *Herndon* v. *Lowry*,[24] was a judgment reversed because of failure to apply this standard. This decision was by a divided court. Subsequently this test has been frequently announced by this court and judgments below reversed because of failure of the state court to apply the doctrine. Eventually, in *Cantwell* v. *Connecticut*,[25] in 1940, the doctrine was adopted by unanimous opinion and the judgment below reversed.

Petitioners' Position.

Throughout, petitioners have contended that the clear and present danger doctrine should be applied in proceedings to punish for constructive contempt by publication and *a fortiori* in jurisdictions, such as California, where the proceedings are summary. Respondent's reply is that the two tests (tendency to interfere and clear and present danger) are substantially identical, but, if not, the circumstance that the obstructive quality of the publication must be established beyond a reasonable doubt causes "this difference in degree or danger"[26] to become academic. In a summary proceeding the tendency doctrine, as applied by the California state court, permits the judge conducting the proceedings to determine, from a subjective or introspective

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[23] 249 U. S. 47.
[24] 301 U. S. 242.
[25] 310 U. S. 296.
[26] Resp. Supp. Br. 19.

consideration of the editorial, whether it has a tendency to interfere with the orderly administration of justice, and, as the California Supreme Court declared, the stipulated facts of the case, as contrasted with such introspective consideration, did no more than cause a conflict in the evidence (R. 134; Pet. Rep. Br. pp. 10-11).

The clear and present danger doctrine, as construed and applied in the several opinions of this court, requires an objective consideration, that is, a weighing of the evidence and a determination "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about"[27] a substantial interference with the orderly administration of justice.

When a judge might conclude, from an introspective consideration of an editorial, that it had a *reasonable* tendency to interfere, is impracticable, if not impossible, of determination. The degree of proof would vary not alone with different judges but perhaps with different moods of the same judge. Such a test is thought by petitioners to be so vague and indefinite as to justify the declaration that it "is repugnant to the guarantee of liberty contained in the Fourteenth Amendment."[28]

Legislative Declaration of State's Policy.

In *Gitlow* v. *New York*, the opinion states:

> "By enacting the present statute the State has determined, through its legislative body, that utterances

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[27] *Schenck v. United States*, 249 U. S. 47, at 52; *Schaefer v. United States*, 251 U. S. 466, at 482 (dissenting opinion of Mr. Justice Brandeis); *Gitlow v. New York*, 268 U. S. 652, at 672 (dissenting opinion of Mr. Justice Holmes); *Herndon v. Lowry*, 301 U. S. 242, at 256; *Thornhill v. Alabama*, 310 U. S. 88, at 105; *Cantwell v. Connecticut*, 310 U. S. 296, at 311.

[28] *Herndon v. Lowry*, 301 U. S. 242, at 259.

> advocating the overthrow of organized government by *force, violence and unlawful means,* are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. *That determination* must be given great weight."[29]

In *Cantwell* v. *Connecticut,* it is said:

> "Such a declaration of the *State's policy* would weigh heavily in any challenge of the law as infringing constitutional limitations."[30]

In California we have a legislative declaration of the state's policy, which should weigh heavily in any consideration of the law on the subject of constructive contempts by publication. The statute reads:

> "No speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the *immediate presence* of such court while in session and in such a manner as to *actually interfere* with its proceedings."[31]

The occasion for the adoption of this statute resembled that which resulted in the enactment of the federal contempt statute of 1831 immediately following the impeachment proceedings of Judge Peck.[32] The Supreme Court of California, however, has rejected this legislative determination, has declared the statute unconstitutional, assigning as reason therefor the inherent power fallacy predicated on the legal and historical error of the *Wilmot opinion,* which has been rejected in every well considered discussion of recent time.

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[29] 268 U. S. 652, at 668.

[30] 310 U. S. 296, at 307-308.

[31] *Code of Civil Procedure* 1209, Subdiv. 11.

[32] See dissent of Mr. Justice Edmonds in *Bridges case,* 14 Cal. (2d) 464, at 504-507.

Indefiniteness of Test (Adopted by the State Courts).

The test applied, whether by statute or judicial decision, should be

> " * * * 'sufficiently explicit to inform those who are subject to it, what conduct on their part will render them liable to its penalties,' and be couched in terms that are not 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' "[33]

Applying this test to the Times editorials, we have this situation: The gentlemen of a committee of a local bar association, who instituted and prosecuted these proceedings, it is fair to assume, proceeded after mature deliberation and industrious analysis of the Times editorials. By affidavit preceding issuance of citation of contempt, and by argument subsequent thereto, these attorneys contended that each of the seven editorials complained of constituted a contempt of court under the reasonable tendency theory. The trial judge declared that but *five* of the seven were contumacious and that two were not. Upon review the state Supreme Court held that only three of the seven were proscribed. Two members of the court were of the opinion that no one was contemptuous.

With such divided opinion among attorneys and judges, we think it persuasive to the point of conviction that the tendency test, as applied by California courts, is an example of "judicial caprice",[34] and that the test is not "sufficiently explicit to inform those who are subject to it, what conduct on their part will render them liable to its penalties", and that it is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[35]

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[33] *Whitney v. California*, 274 U. S. 357, at 368.

[34] *Law and Its Administration*, by Harlan F. Stone (Columbia University Press, 1924), p. 45.

[35] *Whitney v. California*, 274 U. S. 357, at 368.

If a citizen, in the exercise of this "vital individual freedom," must guess against "the possibility of a jail sentence under a summary punishment for contempt",[36] is he not being silenced by "oblique methods"[37] of censorship?

In the opinions of this court is found authority for the statement that silence coerced by law is the argument of force in its worst form.[38]

Criteria Suggested by Respondent Are Vague and Undefined.

The criteria suggested by respondent in its Supplemental Brief will utterly confound the average citizen. We quote some of them:

> "potential influence upon phases of the case which were still pending."
>
> "publications which are so timed and circumstanced as to possess sufficient momentum to invade the judicial chambers."
>
> "potentiality to interfere with the deliberations of the Supreme Court."
>
> "the requisite reasonable tendency to disrupt the judicial calm."
>
> "the utterance and its inherent momentum."[39]

These expressions qualify for the "vague and undefined terminologies in dragnet clauses" referred to in a dissenting opinion in the *Meadowmoor Dairies case*.[40]

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[36] *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U. S. 287, at 302, 308 (dissenting opinion of Mr. Justice Black).

[37] *Mr. Justice Brandeis* (Yale University Press, 1932), p. 111.

[38] *Whitney v. California*, 274 U. S. 357, at 375-376 (concurring opinion of Mr. Justice Brandeis).

[39] Resp. Supp. Br. 41 and 42.

[40] 312 U. S. at 312.

This court announced in the *Thornhill case:*

> "Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society."[41]

Free Speech Involves Practical Considerations. The Tendency Test is Always Speculative, Sometimes Fanciful.

In their exercise the rights of free speech and a free press are essentially exact or *practical* affairs.

Actual interference with the orderly administration of justice is likewise a practical matter. On the other hand, determination of what constitutes a tendency to interfere is essentially a speculative proceeding.

Whether a tendency to interfere exists will always be a matter of speculation, perhaps of fancy or imagination, as suggested in the instant case in one of the dissenting opinions (R. 140, 148).

When the practical exercise of freedom of speech or of the press is abridged, the rule of abridgment, if it is not the equally practical rule of actual interference, should be not less than the clear and present danger doctrine.

Responsibility of the Courts in Contempt Proceedings.

In *Schneider* v. *State* it is said:

> "* * * the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."[42]

Perhaps the task is more delicate and difficult where the exercise of these rights is said to substantially interfere

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[41] 310 U. S. 88, at 104.

[42] 308 U. S. 147, at 161.

with the orderly administration of justice. Not alone the courts, but the public is interested in the administration of justice and in the maintenance to a prominent and conspicuous degree of the independence, integrity and impartiality of the courts. It does not promote the public concept of intelligence and independence of the courts to have a judicial determination that our judges are so responsive to outside influence, and so lacking in mental discipline and fortitude, that in the orderly administration of justice, under like circumstances to those of record in the Los Angeles Times case, like editorial comment must be proscribed. The exercise of the rights of freedom of speech and of the press will be impaired and abridged, and respect for, and confidence in, the intelligence and independence of the courts appreciably diminished, if the judicial tribunals of last resort declare that judges are such flabby creatures that, following return of the jury's verdict of guilty in felony cases, temperate comment and commendation of law enforcement must be withheld until the fate of the defendant has been finally determined. A proper exercise of the right of free speech and a free press, and the proper observance of the correlative duty imposed, will not permit such abridgment of these fundamental rights. The maintenance of the correct and popular conception of independence, integrity and intelligence of the courts should not permit judicial announcement that the infirmities of its judges require such whittling away of the Bill of Rights. Trial judges are not men of such delicate moral fibre and frail mental fortitude that dignified and temperate approval of administration of law enforcement following verdicts of guilt must be withheld until all conventional proceedings have been exhausted by the convicted felon.

Accommodation of Constitutional Guaranties and Governmental Functions.

The California Supreme Court declared that "Liberty of the press is subordinate to the independence of the judiciary • • • ." (R. 137)

We think the statement is unfortunate and unnecessary. If the disposition of this case requires an adjudication of this precise point, we take the position that the statement is incorrect.

The state Supreme Court should have said, as did this court in the Flag Salute case:

> "Our present task, then, as so often the case with courts, is to reconcile two rights in order to prevent either from destroying the other."[43]

And might well have paraphrased the language of this court and declared:

> But because in safeguarding freedom of speech and of the press we are dealing with interests so essential and so dear, every possible leeway should be given to the claim of freedom of the press.

The holding of this court, as reflected by several opinions, has not been to subordinate constitutional liberties to governmental functions when the exercise of the one appears to conflict with the administration of the other. The practice has been to reconcile the rights or to accommodate the exercise of one and the administration of the other, to the end that there will be reasonable enjoyment and administration of each without subordination of either.[44]

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[43] *Minersville School District v. Gobitis*, 310 U. S. 586, at 594.

[44] *Whitney v. California*, 274 U. S. 357, at 374 (concurring opinion of Mr. Justice Brandeis); *Herndon v. Lowry*, 301 U. S. 242, at 258; *Schneider v. State*, 308 U. S. 147, at 161, 164; *Thornhill v. Alabama*, 310 U. S. 88, at 95-96; *Cantwell v. Connecticut*, 310 U. S. 296, at 304, 307, 308; *Minersville School District v. Gobitis*, 310 U. S. 586, at 593-594, 596; *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U. S. 287, at 298-299; *American Federation of Labor v. Swing*, 312 U. S. 321, at 325-326.

From the dissenting opinion in the Flag Salute case we quote:

> "• • • where there are competing demands of the interests of government and of liberty under the Constitution, and where the performance of governmental functions is brought into conflict with specific constitutional restrictions, there must, when that is possible, be reasonable accommodation between them so as to preserve the essentials of both and that • • • is the function of courts to determine whether such accommodation is reasonably possible."[45]

The judicial is one of the three coordinate departments of government. The administration of justice is a governmental function. If it appears that the exercise of this governmental function by the state comes "into fatal collision with the overriding interest protected by the federal compact",[46] a "reasonable accommodation between them so as to preserve the essentials of both"[47] requires application of the actual obstruction test, or at least the clear and present danger doctrine, in summary proceedings for contempt by publication. Although its mandate has been rejected by the state court, the California legislature has adopted and proclaimed the actual interference test in summary proceedings for contempt by publication. In accommodating exercise of constitutional right and administration of governmental function, the legislature should not be denied "the right to select appropriate means for its attainment • • • ."[48] If there is no actual interference with the administration of justice, there should be no actual interference with the "constitutional guaranties of civil liberties and the specificity of their command where free-

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[45] *Minersville School District v. Gobitis*, 310 U. S. 586, at 603.

[46] *Cantwell v. Connecticut*, 310 U. S. at 307.

[47] 310 U. S. at 603.

[48] 310 U. S. at 595.

dom of speech"[49] is concerned. Such we believe to be a "reasonable accommodation between" "the interests of government and of liberty under the Constitution."[50]

In summary proceedings for contempt by publication, adoption of the actual interference test or the clear and present danger doctrine will comply with the requirement announced by this court in *De Jonge* v. *Oregon* (1937), that "legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed."[51] Proscribing all comment on judicial proceedings until finally terminated would constitute a curtailment and abridgment of the right of free speech. However, the right would not be abridged, but its abuse would be dealt with, if comment upon pending judicial proceedings is proscribed, only when it is of such a nature and published under such circumstances as to bring about an actual interference, or create a clear and present danger that it will bring about a substantial interference with the judicial proceedings about which comment is made.

CONCLUSION.

For the reasons assigned in the several briefs of petitioners and those of amici curiae, the judgment of the Supreme Court of California should be reversed.

Respectfully submitted,

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[49] *Minersville School District v. Gobitis*, 310 U. S. 586, at 602 (dissenting opinion of Mr. Justice Stone).

[50] 310 U. S. at 603.

[51] 299 U. S. 353, at 364-365.